

NOTICE OF SUPPLEMENTAL PROPOSED RULEMAKING

TITLE 12. NATURAL RESOURCES

CHAPTER 15. DEPARTMENT OF WATER RESOURCES

PREAMBLE

1. The register citations and dates for the Notice of Rulemaking Docket Opening, the Notice of Proposed Rulemaking, and any Notice of Supplemental Proposed Rulemaking, if applicable:

Notice of Rulemaking Docket Opening: 16 A.A.R. 2063, October 22, 2010

Notice of Proposed Rulemaking: 17 A.A.R. ___, May 27, 2011

2. Sections Affected

Rulemaking Action

R12-15-723

Amend

3. The specific statutory authority for the rulemaking, including both the authorizing statute (general) and the implementing statute (specific):

Authorizing statutes: A.R.S. §§ 45-105(B)(1) and 45-576(H)

Implementing statute: A.R.S. § 45-576

4. The name and address of agency personnel with whom persons may
communicate regarding the rulemaking:

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or

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5. An explanation of the rule, including the agency's reasons for initiating the rule:

Reasons for initiating the rule:

A person may not offer subdivided lands for sale or lease in an active management area ("AMA") without first obtaining either a certificate of assured water supply from the Arizona Department of Water Resources ("Department") or a commitment of water service from a water provider that has been designated by the Department as having an assured water supply. A.R.S. § 45-576(A). "Assured water supply" is defined by statute to mean that sufficient groundwater, surface water or effluent of adequate quality will be continuously available to satisfy the water needs of the proposed use for at least 100 years; that the financial capability has been demonstrated to construct the necessary water facilities to make the water supply available for the proposed use; and that the projected groundwater use is consistent with the AMA's management plan and management goal. A.R.S. § 45-576(J).

The Department's Assured and Adequate Water Supply Rules, R12-15-701 *et seq.* ("AAWS Rules"), set forth criteria that an applicant for an assured water supply determination must meet to demonstrate an assured water supply. The criteria for demonstrating that an applicant's projected groundwater use is consistent with the AMA's management goal is different for each AMA. Generally, applicants for assured water supply determinations in the Phoenix, Pinal, Prescott and Tucson AMAs must demonstrate that only a small percentage of their total estimated water demand will be met with groundwater. Beginning in 2025, applicants for certificates of assured water supply in those AMAs must demonstrate that no groundwater will be used. *See* R12-15-724 through R12-15-727.

One exception to these restrictions on groundwater use is the ability of an applicant to purchase an existing grandfathered groundwater right in the AMA, extinguish that right and obtain a small volume of extinguishment credits that can be used to offset an equal volume of groundwater use. *See* R12-15-723. Once a grandfathered groundwater right is extinguished in this manner, no groundwater may be withdrawn pursuant to the right. For an irrigation grandfathered right ("IGFR"), this means that no more agricultural production may occur on the land to which the right was appurtenant.

A number of agricultural landowners within AMAs extinguished their IGFRs during the housing boom in calendar years 2005, 2006 and 2007 in anticipation that their lands would be developed within a short time thereafter. However, due to the

dramatic downturn in the real estate market that became wide-spread by 2008, and the subsequent tightening of credit by banks, much of that land is still undeveloped. As a result, substantial areas of farmland slated for future residential development are now stranded in a status where they cannot be used for either purpose. Members of the agricultural and development communities have asked the Department to amend the AAWS Rules to allow for the restoration of the IGFRs that were appurtenant to these lands so that the lands can be put back into agricultural production until the housing market improves.

While the lack of water use on these lands benefits the aquifer, as no groundwater is being used, the Department recognizes the need to assist in the economic recovery of the regions where these lands are located by allowing the lands to be put to a productive use. Therefore, the Department is proposing to amend the AAWS Rules to allow for the restoration of an IGFR that was extinguished during calendar year 2005, 2006 or 2007 if certain conditions are met, including that the land to which the IGFR was appurtenant remains capable of being irrigated. The proposed amendment will allow continued productive use of otherwise idle land, which will increase overall economic activity without significantly impacting groundwater supplies. Additionally, the amendment will eliminate the dust and weed problems that exist with idle, undeveloped lands.

An explanation of the rule:

The Department is proposing to amend R12-15-723 to add new subsections (I), (J), (K) and (L). New subsection (I) allows a person to apply to the Director on or before December 31, 2015 for the restoration of all or a portion of an IGFR that was extinguished during 2005, 2006 or 2007 if the person owns the land to which the right or portion of the right was appurtenant and the following additional conditions are met:

- The land to which the right or portion of the right was appurtenant must be physically capable of being irrigated and the infrastructure for delivering water to the land for irrigation purposes must be intact and operable. Land is not physically capable of being irrigated if it has been developed for a non-irrigation use or if other physical changes have occurred making it not possible to irrigate the land.
- The person must hold extinguishment credits that were issued for the extinguishment of a grandfathered right in the AMA in which the land is located and that have not been pledged to a certificate or designation in an amount equal to the amount of extinguishment credits issued by the Director in exchange for extinguishment of the irrigation grandfathered right or portion of the right.

New subsection (J) requires an application to restore all or a portion of an IGFR to be on a form provided by the Director, include a filing fee of \$250.00 and contain the following information:

- The irrigation grandfathered right number of the right sought to be restored.

- The original certificate of extinguishment credits issued by the Director for the extinguishment credits held by the applicant as described above, or an affidavit stating that the certificate is lost.
- A copy of a deed showing that the applicant owns the land to which the right or portion of the right sought to be restored was appurtenant. If the application seeks to restore only a portion of the irrigation grandfathered right, the application must also include the legal description of the land to which that portion of the right was appurtenant.
- A certification that all the conditions in subsection (I) are met.
- An agreement in writing that if the right or portion of the right is restored, the flexibility account for the land to which the right or portion of the right is appurtenant will have an account balance of zero at the beginning of the calendar year in which the right or portion of the right is restored and that any credits registered to the flexibility account after the right is restored may not be conveyed or sold to any person, including the applicant.

New subsection (K) requires the Director to approve an application for restoration of an IGFR if the application includes the required fee and the required information, and the Director determines that the information is correct. If the Director approves the application, all the following will apply:

- The irrigation water duty for the land to which the right or portion of the right is restored will be the same as it was when the right was extinguished, unless the irrigation water duty is changed in a management plan adopted after the right was extinguished or is modified pursuant to A.R.S. § 45-575.

- The flexibility account for the land to which the right or portion of the right is appurtenant will have an account balance of zero at the beginning of the calendar year in which the right or portion of the right is restored and any credits registered to the flexibility account after the right is restored may not be conveyed or sold to any person, including the applicant.
- The extinguishment credits held by the applicant as described above shall be forfeited.
- The restored irrigation grandfathered right may be extinguished in the future in exchange for extinguishment credits. For purposes of calculating the amount of extinguishment credits, the calendar year of extinguishment will be the calendar year in which the restored irrigation grandfathered right is extinguished.

New subsection (L) establishes the following licensing time-frames for an application to restore an irrigation grandfathered right: (1) an administrative completeness time-frame of 30 days; (2) a substantive review time-frame of 90 days; and (3) an overall time-frame of 120 days. The application will be subject to the licensing time-frame provisions in R12-15-401.

6. An explanation of the substantial change that resulted in the supplemental notice:

After the Department filed the Notice of Proposed Rulemaking, it realized that a specific limitation regarding the restoration of all or a portion of an IGFR had not been included in the text of the proposed rule. The language of R12-15-723(I)(3) in the Notice of Proposed Rulemaking states that in order for a person to apply for the restoration of all or a portion of an IGFR that was extinguished during 2005, 2006 or

2007, the person must hold extinguishment credits that have not been pledged to a certificate or designation pursuant to subsection (E) or (F) of R12-15-723 in an amount equal to the extinguishment credits issued for the extinguishment of the IGFR or portion of the IGFR sought to be restored. Under subsection (K)(3) of R12-15-723, the person forfeits the extinguishment credits described in section (I)(3) if the IGFR or portion of the IGFR is restored. The Department realized that subsection (I)(3) could be interpreted to mean that a person could acquire extinguishment credits issued in one AMA and use those credits to restore an IGFR held by the person in a different AMA.

That was not the Department's intention. Rather, the Department intended that extinguishment credits used to restore all or a portion of an IGFR must have originally been issued in the same AMA in which the person's land is located. The purpose of this supplemental rulemaking is to add language for that limitation to R12-15-723(I)(3).

7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

8. The preliminary summary of the economic, small business, and consumer impact:

1. Identification of the proposed rulemaking.

The purpose of this proposed rulemaking is to address concerns raised by the agricultural and development communities regarding agricultural lands within active management areas that had their irrigation grandfathered rights (“IGFRs”) extinguished in exchange for assured water supply extinguishment credits during 2005, 2006 and 2007 in anticipation of development occurring on the lands. Due to the economic recession, many of these lands have not been developed and are not anticipated to be developed in the near future. Because the lands no longer have an IGFR, they cannot be put into agricultural production, creating an economic hardship for the landowners. These idle, vacant lands also create possible dust control issues and negative aesthetic values for the communities where they are located.

Through this rulemaking, the Department is proposing to amend R12-15-723 to allow the owners of these lands to apply to the Department to have their extinguished IGFRs restored. The Department will be required to restore an extinguished IGFR if the extinguishment credits previously issued to the landowner have not been conveyed or pledged to a certificate or designation of assured water supply and certain other conditions are met.

2. Persons who will be directly affected by, bear the costs of, or directly benefit from the proposed rulemaking.

Approximately 20,359 acres and 276 irrigation grandfathered right-holders will be affected by, bear the costs, or directly benefit from the proposed rulemaking.

3. Cost-benefit analysis.

- a. Probable costs and benefits to the implementing agency and other agencies directly affected by the implementation and enforcement of the proposed rulemaking including the number of new full-time employees necessary to implement and enforce the proposed rule.

Probable costs to ADWR of the proposed rulemaking would include costs associated with processing applications to restore extinguished IGFRs.

However, ADWR will charge an application fee that should allow the Department to recover its costs. The Department would not be required to hire new full-time employees. Current staff resources will be used to implement and enforce the proposed rulemaking.

The proposed rulemaking will benefit the Arizona State Land Department (“ASLD”) because it owns lands that had IGFRs extinguished during 2005, 2006 and 2007. Some or all of these lands may be eligible to have their IGFRs restored under this rulemaking. If the IGFRs are restored, ASLD will be able to generate income from otherwise unproductive lands.

- b. Probable costs and benefits to a political subdivision of this state directly affected by the implementation and enforcement of the proposed rulemaking
- Irrigation Districts within active management areas will benefit from this rulemaking because if IGFRs within their districts are restored, the owners

and lessees of these lands will purchase water from the districts, resulting in increased revenues for the districts.

Nearby cities and towns will receive more sales tax revenues because the owners and lessees of the lands will purchase farming equipment and materials for agricultural production. In addition, additional agricultural jobs will be created, which will increase tax revenues.

The proposed rulemaking will benefit the cities and towns that own lands that had their IGFRs extinguished during 2005, 2006 and 2007. By allowing the IGFRs to be restored, these cities and towns will have the opportunity to put the lands back into agricultural production, creating additional revenues for the cities and towns.

- c. Probable costs and benefits to businesses directly affected by the proposed rulemaking, including any anticipated effect on the revenues or payroll expenditures of employers who are subject to the proposed rulemaking.

The probable costs to businesses directly affected by the proposed rulemaking will include a fee of \$250.00 for the Department to process an application to restore an IGFR. The benefits to businesses will include the ability to bring vacant lands back into agricultural production, which will provide revenue to businesses that own or lease the lands. Dust control problems associated with these lands also will be alleviated.

4. Probable impact on private and public employment in business, agencies, and political subdivisions of this state directly affected by the proposed rulemaking.

The probable impacts on private and public employment in businesses, agencies, and political subdivisions that are directly affected by the proposed rule are positive. Reestablishing these lands into agricultural production will create job opportunities and revenue for the agricultural community by allowing crops to be grown on an otherwise unproductive land.

5. Probable impact of the proposed rulemaking on small business.

a. Identification of the small businesses subject to the proposed rulemaking.

Small businesses that own land that had an IGFR extinguished during 2005, 2006 and 2007, including small farms and small development companies.

b. Administrative and other costs required for compliance with the proposed rulemaking.

The probable costs to small businesses directly affected by the proposed rulemaking will include a fee of \$250.00 for ADWR to process an application to restore an IGFR.

c. A description of the methods that the agency may use to reduce the impact on small business.

Not applicable

- d. Probable cost and benefit to private persons and consumers who are directly affected by the proposed rulemaking.

Benefits to private persons and consumers will include the reestablishment of vacant lands to agricultural production. Possible dust control issues will be alleviated and the negative aesthetic value for the communities where the lands are located will be improved.

6. Probable effect on state revenues.

An application fee of \$250.00 per IGFR to be restored will be collected and used by ADWR to implement the requirements of the proposed rulemaking.

The restoration of IGFRs for these lands will result in the state of Arizona receiving more sales tax revenues because the owners and lessees of the lands will purchase water, farming equipment and farming materials. In addition, jobs will be created in the agricultural community, which will increase tax revenues.

7. Less intrusive or less costly alternative methods of achieving the purpose of the proposed rulemaking, including the monetizing of the costs and benefits for each option and providing the rationale for not using non-selected alternatives.

None

9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business and consumer impact statement:

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10. The time, place, and nature of the proceedings for the making, amendment, or repeal of the rule:

An oral proceeding regarding the proposed rules will be held as follows:

Date: July 6, 2011

Time: 10:00 a.m.

Location: Arizona Department of Water Resources

3550 N. Central Ave., Second Floor, Verde Conference Rooms

Phoenix, AZ 85012

The rulemaking record will close on July 6, 2011 at 5:00 p.m.

11. Any other matters prescribed by statute and applicable to the specific agency or to any specific rule or class of rules:

None

12. Any material incorporated by reference and its location in the text:

None

13. The full text of the rules follows:

TITLE 12. NATURAL RESOURCES

CHAPTER 15. DEPARTMENT OF WATER RESOURCES

ARTICLE 7. ASSURED AND ADEQUATE WATER SUPPLY

Section

R12-15-723. Extinguishment Credits

ARTICLE 7. ASSURED AND ADEQUATE WATER SUPPLY

R12-15-723. Extinguishment Credits

- A.** No change
 - 1. No change
 - 2. No change
 - 3. No change
 - 4. No change
 - a. No change
 - b. No change
 - 5. No change
 - 6. No change
- B.** No change
- C.** No change
- D.** No change
 - 1. No change
 - 2. No change

3. No change
 4. No change
 5. No change
 6. No change
- E.** No change
- F.** No change
- G.** No change
1. No change
 2. No change
- H.** No change
- I.** A person may apply to the Director on or before December 31, 2015 for the restoration of all or a portion of an irrigation grandfathered right extinguished under this Section during calendar year 2005, 2006 or 2007 if all of the following conditions are met:
1. The person owns the land to which the right or portion of the right was appurtenant;
 2. The land to which the right or portion of the right was appurtenant is physically capable of being irrigated and the infrastructure for delivering water to the land for irrigation purposes remains intact and is operable;
 3. The person holds extinguishment credits that were issued for the extinguishment of a grandfathered right in the AMA in which the land is located and that have not been pledged to a certificate or designation under

subsection (E) or (F) of this Section in the following amount, as applicable:

- a. If the person seeks to restore the entire irrigation grandfathered right, an amount of extinguishment credits equal to the amount of extinguishment credits issued by the Director in exchange for extinguishment of the irrigation grandfathered right; or
- b. If the person seeks to restore a portion of the irrigation grandfathered right, an amount of extinguishment credits equal to the result obtained by multiplying the percentage of the right sought to be restored by the amount of extinguishment credits issued by the Director in exchange for the extinguishment of the right.

J. An application to restore all or a portion of an irrigation grandfathered right under subsection (I) of this Section shall be on a form provided by the Director and shall include all of the following:

1. A fee of \$250.00;
2. The irrigation grandfathered right number of the right sought to be restored;
3. The original certificate of extinguishment credits issued by the Director for the extinguishment credits described in subsection (I)(3) of this Section or an affidavit stating that the certificate is lost;
4. A copy of a deed showing that the applicant owns the land to which the right or portion of the right sought to be restored was appurtenant and, if

the application seeks to restore only a portion of the right, the legal description of the land to which that portion of the right was appurtenant;

5. A certification by the applicant that the conditions described in subsection (I) of this Section are met; and

6. An agreement in writing that if the right or portion of the right is restored, the flexibility account for the land to which the right or portion of the right is appurtenant shall have an account balance of zero at the beginning of the calendar year in which the right or portion of the right is restored and that any credits registered to the flexibility account after the right is restored may not be conveyed or sold to any person, including the applicant.

K. The Director shall approve an application to restore all or a portion of an irrigation grandfathered right submitted under subsection (I) of this Section if the application includes the fee and the information required under subsection (J) of this Section and the Director determines that the information is correct. If the Director approves an application to restore all or a portion of an irrigation grandfathered right, all of the following shall apply:

1. The irrigation water duty for the land to which the right or portion of the right is restored shall be the same as it was when the right was extinguished, unless the irrigation water duty is changed in a management plan adopted after the right was extinguished or is modified pursuant to A.R.S. § 45-575;

2. The flexibility account for the land to which the right or portion of the right is appurtenant shall have an account balance of zero at the beginning of the calendar year in which the right or portion of the right is restored and any credits registered to the flexibility account after the right is restored may not be conveyed or sold to any person, including the applicant.
3. The applicant shall forfeit the extinguishment credits described in subsection (I)(3) of this Section; and
4. The restored irrigation grandfathered right may be extinguished in exchange for extinguishment credits under this Section. For purposes of calculating the amount of extinguishment credits under R12-15-724(B), R12-15-725(B), R12-15-726(B) or R12-15-727(B), the calendar year of extinguishment shall be the calendar year in which the restored irrigation grandfathered right is extinguished.

L. The Director shall review an application to restore an irrigation grandfathered right under subsection (I) of this Section pursuant to the licensing time-frame provisions in R12-15-401. The application shall have an administrative completeness review time-frame of 30 days, a substantive review time-frame of 90 days and an overall time-frame of 120 days.